APPEAL NO. 94250

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was convened in (city), Texas, on October 18, 1993, and was continued until January 12, 1994, with the record closing on that date. The appellant (hereinafter carrier) appeals the determination of the hearing officer, (hearing officer), that the respondent (hereinafter claimant) reached maximum medical improvement (MMI) statutorily, with an impairment rating (IR) of 18%, as found by the designated doctor appointed by the Texas Workers' Compensation Commission (Commission). Specifically, the carrier urges error in the hearing officer's reliance upon a December 7, 1993, letter from the designated doctor, to find claimant's IR; in his refusal to admit into evidence the report of carrier's doctor; in his refusal to allow the testimony of one of carrier's witnesses; and in finding a statutory date of MMI. The claimant did not file a response.

DECISION

The decision and order of the hearing officer is affirmed in part and reversed and remanded in part.

It was not controverted that the claimant, who worked for (employer) in (city), Texas, injured his back on (date of injury), when he lifted one end of a pipe which he said weighed approximately 300 pounds. He was seen in an emergency room that day and later treated with (Dr. ST), who on February 27th took claimant off work and diagnosed muscle spasm of the lumbar and thoracic spine, lumbosacral sprain/strain, facet syndrome, and radiculitis due to disc displacement.

Claimant thereafter moved to (city) and was referred to (Dr. SM), whose initial diagnosis on April 12, 1991, was probable lumbar spine disc syndrome. He recommended spinal manipulation, as well as ice packs and electrical stimulation, and referred the claimant for an MRI, which was normal. The claimant continued to treat with Dr. SM, who referred him to (Dr. W), an orthopedist. On June 12, 1992, Dr. W wrote of claimant's continued complaints of pain; he noted claimant's negative MRI and x-rays (which he said showed no fractures or dislocation, and no evidence of spondylolysis or spondylolisthesis) and suggested a bone scan to determine evidence of occult bony injury.

On February 5, 1992, claimant requested to change treating doctors, from Dr. SM to (Dr. H). On February 13th, Dr. H gave a diagnosis of thoracic sprain and lumbar discogenic syndrome and stated that claimant was unable to work. On April 8th, Dr. H said the claimant had undergone a functional capacity evaluation and was not currently able to return to his previous type of employment; he noted claimant had begun a work hardening program. He recommended EMG's which revealed evidence of mild L5 radiculopathy and S1 radiculopathy bilaterally.

On December 4, 1991, carrier had sent claimant a letter confirming a conversation wherein it was mutually agreed that claimant would be examined by a doctor of carrier's

choice. The letter informed claimant of a December 23rd appointment with (Dr. E), an orthopedist. At the hearing claimant testified that during this period of time he did not have a telephone and was actually living in Mexico although receiving mail at the Texas address of a relative. He also denied he agreed to see this doctor, and maintained that he went only because he thought he had to in order not to lose his benefits. Dr. E issued a Report of Medical Evaluation (Form TWCC-69) and attached narrative in which he found MMI "at three months following the date of injury," with an IR of seven percent.

The claimant contended at the hearing that he did not see this report and that it was not sent to his then-treating doctor, Dr. SM. However, on January 22, 1992, Dr. SM wrote Dr. W forwarding a copy of Dr. E's report and questioning whether Dr. W felt that a bone scan was still appropriate. Dr. SM also referred to Dr. E's report in subsequent medical reports, including a report (Form TWCC-64) dated March 10, 1992, in which he stated claimant's prognosis was good and that he "appears to possess an impairment of 7%." In the same report, however, he did not indicate that claimant had reached MMI.

In an undated TWCC-69, Dr. H found claimant to have reached MMI on June 3, 1992, with a 31% whole body IR. On July 15, 1993, claimant requested to change treating doctors from Dr. H to (Dr. V), due to the fact that he had moved back to (city) from (city). On July 29, 1993, Dr. V gave his diagnosis as "low back pain," and he recommended that claimant seek retraining in a lighter field. Dr. V also wrote he saw no need for further treatment and that claimant had reached MMI. On August 17th, Dr. V completed a TWCC-69 giving claimant's MMI date as July 29, 1993, with a five percent IR.

Based upon Dr. E's report, the carrier terminated claimant's temporary income benefits (TIBS) on January 16, 1992, and initiated 21 weeks of impairment income benefits (IIBS). At the hearing, the claimant said he could not remember when he first saw Dr. E's report. He was represented by an attorney during the time period of February 18, 1992, through June 7, 1993. Claimant said he notified his attorney "when the checks stopped coming," which was during the summer of 1992. On July 10, 1992, claimant's attorney filed an "emergency" request for a benefit review conference; a dispute resolution form said claimant's attorney believed the claimant was due IIBS based on Dr. H's IR, while the carrier maintained that Dr. E's seven percent IR was not timely disputed. On September 18, 1992, a Commission disability determination officer wrote the parties stating that a contested case hearing scheduled for October 22, 1992, had been cancelled without prejudice because the disputed issue had been resolved. Apparently the parties had informally agreed to try to come up with a designated doctor, but it appears that nothing came of this.

On July 19, 1993, the Commission appointed (Dr. O) designated doctor to determine percentage of impairment only. Dr. O determined claimant had reached MMI on August 17, 1993, with a 15% IR based on "AMA Guides 3rd ed." Under the section which asks the doctor to document objective laboratory or clinical finding of impairment, Dr. O wrote:

The following impairment values were given. Lumbar flexion 5%, lumbar extension 5%, right lateral flex 2%, left lateral flex 2%. All range of motion values were

from page 98. Lumbar range of motion deficit yielded 14% of whole person. Based on the radiculopathy the following impairment was determined. 25% for each of right L5 & S1 roots (table 10) multiplied by 5% for each root L5 S1 (table 49) yielded 1% impairment from each nerve root resulting in 2% impairment of lower extremity. Table 46 converted 2% of lower extremity to 1% of whole person. Combined values chart combined 14% with 1% yielding 15%.

On September 2, 1993, a Commission benefit review officer apparently wrote Dr. O asking him to confirm whether the "American Medical Association's Guides to the Evaluation of Permanent Impairment, Third Edition Revised" was used in the evaluation of claimant; Dr. O responded that, "I used the revised ed. of AMA Guides. I placed the 3rd ed. side by side with the 3rd ed. and the charts that I used showed no difference." The hearing officer in this case also wrote Dr. O, informing him that the 1989 Act requires that all determinations of impairment shall use "the second printing, dated February, 1989" of the AMA Guides, and asking that Dr. O clarify which edition of the Guides he used in evaluating claimant. On December 7, 1993, Dr. O replied that:

In response to your letter dated 12/1/93 I used the AMA Guides 3rd ed revised. I have since obtained a copy of the guides 2nd printing. The range of motion values are valid. Therefore I utilized the range of motion values that I obtained on the examination of 8/17/93 utilizing the AMA guides to the evaluation of permanent impairment 3rd ed 2nd printing. [Claimant's] disability calculated to a 18% impairment of the whole person.

The hearing officer determined in pertinent part as follows: that claimant was not aware nor had personal knowledge of the report of Dr. E until claimant's income benefits were suspended during the summer of 1992; that claimant disputed Dr. E's report on July 22, 1992, through his attorney; that Dr. O initially used the third edition revised of the AMA Guides, but clarified his report by utilizing the second printing, dated February 1989, for the determination of the existence and degree of claimant's impairment; that on August 17, 1993, and clarified by letter on December 7, 1993, Dr. O issued his signed report and certified claimant reached MMI on August 17, 1993, and assessed an 18% whole body impairment rating; and that the report of Dr. O was not contrary to the great weight of the other medical evidence. The hearing officer concluded that by operation of law the claimant reached statutory MMI on February 11, 1993, with an 18% IR.

The carrier, as noted earlier, raises numerous points on appeal, which will be addressed herein.

WHETHER DR. E'S SEVEN PERCENT IMPAIRMENT RATING BECAME FINAL BECAUSE NOT TIMELY DISPUTED

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), provides that the first impairment rating assigned to an employee is considered final if the rating is not

disputed within 90 days after the rating is assigned. The carrier contends, however, that despite the claimant's statements that he was not aware of any certification of MMI or IR, there is no evidence that this IR was properly disputed. The Appeals Panel has held that the 90 days begins to run when a claimant becomes aware of the rating, not necessarily on the date it is "assigned" by the doctor. Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993. While the claimant's testimony was somewhat unclear as to when he became aware of Dr. E's IR, the hearing officer accepted claimant's statement that he first became aware of it when his checks ceased "during the summer of 1992." (While this finding of fact could otherwise be problematic due to its lack of specificity, we note that the hearing officer in his statement of the evidence says, and it is not challenged by carrier on appeal, that claimant's IIBS continued through June 11, 1992). We have previously held that whether an impairment rating was timely disputed is a question of fact. Texas Workers' Compensation Commission Appeal No. 93047, decided March 5, 1993. While the evidence at times is conflicting on this point, such conflict is for the hearing officer to resolve. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pa. v. Soto, 819 S.W.2d 619 (Tex. App.-(city) 1991, writ denied).

WHETHER THE HEARING OFFICER ERRED IN RELYING UPON DR. O'S LETTER OF DECEMBER 7, 1993, TO FIND AN 18% IMPAIRMENT RATING

The 1989 Act and its rules impose certain requirements upon doctors who certify MMI and assign an IR. One of these is that the statutorily prescribed version of the AMA Guides (i.e., third edition, second printing, dated February 1989) be used to determine impairment. Section 408.124. The hearing officer appropriately sought clarification from Dr. O as to which version of the AMA Guides was used in assessing claimant's IR, especially where Dr. O acknowledged that he had not used the statutory version in his earlier report. Further, where there is more than one report and correspondence of a designated doctor, the hearing officer is not precluded from considering as a whole all such reports and correspondence in determining whether the designated doctor's opinion is entitled to presumptive weight. *See* Texas Workers' Compensation Commission Appeal No. 92469, decided October 15, 1992.

Despite this, we have previously held that the Commission is not required to adopt the IR of a designated doctor regardless of how he arrived at it. Texas Workers' Compensation Commission Appeal No. 93001, decided February 19. 1993. While a designated doctor who has originally used the wrong version of the AMA Guides is entitled to review his findings in light of the correct version, and even to adopt his original findings if he is satisfied that they remain accurate, Dr. O's December 7, 1993, letter appears only to validate that portion of the IR attributable to the prior range of motion measurements. Without explanation, he increased claimant's IR from 15% to 18%. Thus, we find this portion of the decision should be reversed and remanded to allow the hearing officer to

determine from the designated doctor, as expeditiously as possible, the basis for the additional three percent. (We note that Form TWCC-69 states, "[i]f impairment rating is 5% or greater, list specific body part/system and rating." *See also* Texas Workers' Compensation Commission Appeal No. 92613, decided December 28, 1992, wherein it was stated that giving "an overall figure without a breakdown . . . is difficult to examine.") Of course, any further communication from the designated doctor should be provided to the parties for their review and comment.

WHETHER THE HEARING OFFICER ERRED IN FINDING STATUTORY MMI

As the carrier notes, the record contains an entire spectrum of MMI dates, the earliest being Dr. E's determination of "three months following the [(date of injury)] date of injury," all the way to the August 17, 1993 date given by the designated doctor, which was some six months after the statutory date of MMI. While the date of MMI was a fact issue for the hearing officer, we are concerned that he used the improper standard in making such determination. The evidence in the record shows that Dr. O was appointed by the Commission to determine IR only. This panel has previously held that when a designated doctor is selected to determine impairment only, his opinion concerning MMI is not entitled to presumptive weight. Texas Workers' Compensation Commission Appeal No. 93910, decided November 22, 1993. It appears from the hearing officer's findings of fact, wherein he states that Dr. O was appointed to determine MMI and IR, and that Dr. O's report (in its entirety) was not contrary to the great weight of the other evidence, that he gave presumptive weight to Dr. O's date of MMI and accordingly adopted the statutory date as a surrogate. We therefore reverse and remand to allow the hearing officer to re-determine the date of claimant's MMI through a preponderance of the evidence standard.

WHETHER THE HEARING OFFICER ERRED IN REFUSING TO ADMIT THE REPORT OF DR. J AND TO PERMIT THE TESTIMONY OF AP

When the hearing reconvened on January 12, 1994, the carrier attempted to introduce into evidence a report prepared January 5, 1994, by (Dr. J). Dr. J did not examine the claimant but at carrier's request critiqued claimant's case and some of the doctors' opinions. The hearing officer sustained the claimant's objection to this report, due to the fact that it was not timely exchanged. The carrier contends in its appeal that Dr. J was retained only after it received Dr. O's letter of December 7, 1993, and that Dr. J's report was exchanged upon receipt.

The 1989 Act and its rules basically provide that no later than 15 days after the benefit review conference, the parties shall exchange with one another certain items, including "all medical reports and reports of expert witnesses who will testify at the hearing;" thereafter, the parties shall exchange evidence as it becomes available, and the hearing officer shall determine whether good cause exists to admit documents which were not timely exchanged. *See* Section 410.160, Rule 142.13(c). The hearing officer in this case essentially determined no good cause existed because the report of Dr. J could have been submitted earlier. While technically it appears that this document was exchanged shortly after it was

generated, we conclude that the hearing officer did not abuse his discretion in excluding this document, which by and large was a review of claimant's medical records from the years 1991 and 1992. *See* Texas Workers' Compensation Commission Appeal No. 91076, decided December 31, 1991.

Carrier also alleges error in the hearing officer's refusal to permit the testimony of (Mr. P), the adjuster who wrote the December 1991 letter to claimant concerning an appointment with Dr. E. Carrier contends that although Mr. P was not listed as a potential witness, his testimony as a rebuttal witness became necessary when claimant contended that Mr. P never spoke with him.

Despite the fact that carrier attempted to call Mr. P only in rebuttal, and the fact that carrier contends his testimony was "critical" and its exclusion "could obviously have led to the improper decision," it appears that the purpose of Mr. P's testimony was solely to challenge claimant's credibility, which the hearing officer had ample opportunity to judge in the course of this lengthy hearing. The hearing officer also stated that Mr. P's letter would speak for itself. Under the circumstances of this case, we believe that any error on the part of the hearing officer in excluding the testimony of Mr. P was harmless.

We reverse the decision of the hearing officer and remand to allow him to determine from Dr. O the basis upon which that portion of claimant's IR not attributable to range of motion was made. We also remand to allow the hearing officer to determine claimant's MMI date, in conjunction with the opinion herein. A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993. In all other respects, the decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge